



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

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FWS/R4/AES

### Memorandum

To: Deputy Regional Director, FWS, Atlanta, GA (DRD)

From: Assistant Regional Director, FWS, Atlanta, GA (AES)

Subject: Set of Findings: Programmatic Safe Harbor Agreement and Candidate Conservation Agreement with Assurances for the Speckled Pocketbook and Yellowcheek Darter in the Upper Little Red River, Arkansas, and Enhancement of Survival Permit TE-138910/138911

The U.S. Fish and Wildlife Service's (FWS or USFWS) Conway Arkansas Field Office has collaborated with the Natural Resources Conservation Service (NRCS), Arkansas Game and Fish Commission (AGFC), and The Nature Conservancy (TNC) (collectively the Parties) to prepare an application for an Enhancement of Survival Permit (Permit) associated with implementation of the "Programmatic Safe Harbor Agreement and Programmatic Candidate Conservation Agreement with Assurances for the Speckled Pocketbook and Yellowcheek Darter in the upper Little Red River, Arkansas" (Agreement). The Agreement proposes to address the conservation needs of the endangered speckled pocketbook (SPB), *Lampsilis streckeri*, and the yellowcheek darter (YCD), *Etheostoma moorei* -- a federally designated candidate species (collectively the covered species). The Agreement will focus on non-Federal lands in a designated geographic area of the upper Little Red River watershed of Arkansas.

The Agreement contains two distinct components: a Safe Harbor (SHA) program for the endangered SPB and a Candidate Conservation Agreement with Assurances (CCAA) program for the YCD<sup>1</sup>. As part of the approval of the Agreement, the FWS would authorize the incidental take of the covered species using the authority of section 7 and section 10(a)(1)(A) of the Endangered Species Act, as amended (ESA). The incidental take authority for the YCD would not apply, however, unless the species was federally-listed. The FWS offices involved in the development of this action concur that the Agreement meets the applicable regulatory and statutory standards<sup>2</sup> and offer this Set of Findings, wherein we recommend approval of the

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<sup>1</sup> FWS has separate statutory authorities for approving SHAs and CCAAs under the ESA. This document is organized to reflect these separate authorities and offers separate findings, despite the acknowledgement of the virtual identical effects that approval of the Agreement would have on both the SPB and YCD.

<sup>2</sup> Title 50 of the Code of Federal Regulations.

Agreement and issuance of the Permit. The Agreement and all supporting analysis and decision documentation for this action were reviewed by FWS personnel and the Department of Interior's Regional Solicitor's Office. None of those offices or reviewing personnel objected to approval of the Agreement/issuance of the Permit.

## **I. DESCRIPTION OF PROPOSAL:**

The Parties to the Agreement propose to offer technical and other assistance to eligible non-Federal landowners interested in voluntarily implementing and/or maintaining specific conservation actions on their property that are expected, individually and cumulatively, to improve the statuses of either or both of the covered species and/or their habitat within the designated focus watershed. The Agreements' set of conservation actions are identified and outlined in the *Conservation Strategy for the Speckled Pocketbook and Yellowcheek Darter* (Strategy)<sup>3</sup>. The Strategy document was derived through a collaborative effort among the Parties, affected landowners, and other stakeholders, which began in 2005. The Strategy was the first step in a watershed level approach to restore stream habitats in the entire upper Little Red River watershed for the covered species. The Strategy identifies eight major conservation actions, time frames, and responsible partners to undertake the actions for conservation of the covered species. For the most part, these conservation actions are identical for both of the covered species, due to their similar habitat requirements, threats facing both species, etc.

The purpose and conservation goal of the Agreement is to provide a mechanism for implementing the Strategy through some level of monitoring and management of either of the covered species and to encourage voluntary habitat maintenance by landowners who enroll under the Agreement. The net effect of the Agreement will be to increase the amount of habitat available to the covered species, improve water quality conditions (benefiting both of these aquatic species), and increase the ability of the Parties to monitor the species' response to the habitat and water quality improvements. Lastly, the purpose of the Agreement and associated Permit is to provide regulatory assurances to Cooperators.

The enrollment process will connect the landowners to the Agreement through the use of a Property Owner Management Agreement (POMA). The associated Permit will be connected to the landowner through the use of a Certificate of Inclusion (Certificate). Landowners may enroll in the Agreement's SHA component, the CCAA component, or both. At the time of executing the POMA, a landowner will become a Cooperator under the Agreement and for purposing of implementing the Permit as well. Under each POMA, a Cooperator will agree to perform the following conservation actions: 1) control livestock access to streams through fencing and alternative water sources, 2) protect, enhance, or restore terrestrial habitats through easements, riparian buffer establishment and maintenance, installation of erosion control measures, and foregoing detrimental land use practices, 3) protect, enhance, or restore aquatic habitats through

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<sup>3</sup> The Strategy is a component of the FWS' administrative record for this action and used to support this Set of Finding.

easements, stream de-channelization, installation of instream habitat features, streambank stabilization, and road crossing stabilization, 4) species reintroductions, and 5) biological monitoring and any additional conservation measures deemed necessary and appropriate by Parties to the Agreement.

As the FWS evaluates the Agreement, it must consider and evaluate how the Agreement meets both the SHA<sup>4</sup> and/or CCAA<sup>5</sup> standard(s). Thus, this Set of Findings provides an analysis and determination for both standards.

## **II. ENHANCEMENT OF SURVIVAL PERMIT**

### **A. SAFE HARBOR AGREEMENT**

The species that would be affected by the Safe Harbor component of the Agreement and Permit is the federally-listed endangered SPB.

### **ISSUANCE CRITERIA - ANALYSIS AND FINDINGS**

The FWS finds that the Parties have met all of the application requirements for the Permit. In addition, the FWS finds that the Parties have met all issuance criteria for the Permit contained in 50 CFR 17.22(c)(2). These criteria are detailed below.

#### **1. The taking will be incidental to an otherwise lawful activity and in accordance with the terms of the Safe Harbor component of the Agreement.**

The FWS finds that the proposed take of the covered species will be incidental to otherwise lawful activities. Cooperators would be permitted to take the covered species incidental to otherwise lawful future land use actions provided they maintain the baseline responsibilities for the covered species as set forth in the Cooperator's POMA.

#### **2. Implementation of the terms of the Safe Harbor component of the Agreement is reasonably expected to provide a net conservation benefit to the affected listed species by contributing to the recovery of listed species included in the Permit, and the Safe Harbor component of the Agreement otherwise complies with the Safe Harbor policy.**

The net conservation benefit means the cumulative benefits of the management activities identified in a SHA that provide for an increase in a species' population and/or enhancement, restoration, or maintenance of the species suitable habitat within enrolled property(ies), taking into account the length of the SHA and any off-setting adverse effects attributable to the incidental taking allowed by the Permit. Net conservation benefits must be sufficient to

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<sup>4</sup> The Final Safe Harbor Policy is found at 64 FR 32717 and is also explained in Part 4 of the Agreement.

<sup>5</sup> The Final CCAA Policy is found at 64 FR 32726 and is also explained in Part 4 of the Agreement.

contribute, either directly or indirectly, to the recovery of the covered species (USFWS 1999a).

As a prerequisite to enrolling properties under this Agreement, each non-Federal landowner must show that the enrollment of their property would result in a net conservation benefit to the SPB. Each POMA must, therefore, identify the management actions and conservation practices that would be undertaken to accomplish the expected net conservation benefit, describe where and when those benefits would be achieved, and document the agreed-upon time frames the management actions will remain in effect to achieve the anticipated net conservation benefit(s).

Specifically, the conservation practices expected to produce the net conservation benefits are: (1) Control of Livestock Access through the construction of fencing and/or alternative water sources; (2) Protection, Enhancement, or Restoration of Terrestrial Habitats through the development of habitat easements, the creation and/or maintenance of stream buffers, the installation and maintenance of erosion control measures, and/or foregoing detrimental land use practices; (3) Protection, Enhancement, or Restoration of Aquatic Habitats through the development of stream easements, restoration of natural channels, installation of in-stream habitat features, stabilizing stream banks, and/or the stabilizing road crossing(s); and (4) Species Reintroduction(s).

As a result of implementation the practices outlined above, the Parties reasonably expect this Agreement to result in protection, enhancement, and restoration of instream habitat, improved water quality, reduced erosion and sedimentation, improved riparian habitat, and improved land use practices on enrolled properties during the period that the Agreement is valid and operational.

For as long as management activities are carried out on the enrolled properties, or the habitat created persists, enrolled lands will be producing a net conservation benefit to the SPB. These benefits will occur at both the individual and landscape level scale (e.g., each POMA will produce a net conservation benefit and the collective benefit will increase as more and more POMAs are executed throughout the watershed).

The proposed action could result in the future incidental taking of the SPB and their habitat that has been created, enhanced, or restored under this program – occurring when a particular POMA is terminated. At termination, the affected property owner might then exercise his/her right to return the property to its baseline conditions. However, it is important to note that such taking may or may not ever occur. A return to baseline conditions would mean a return to the same circumstances that existed prior to enrollment. Even in this situation, which is not anticipated to be a common event based upon historical interest and participation in the either the SHA or CCAA programs nationally, the on the ground actions of a particular POMA will have provided interim benefits in the form of population and demographic maintenance during its duration. Although habitat may be destroyed at the termination of any POMA, this temporary adverse impact is more than outweighed by the cumulative implementation of the POMAs still active throughout the watershed. If circumstances change and the Parties find that these cumulative benefits are not being sustained (e.g., termination rates for executed POMAs are higher than anticipated), then the Parties will reevaluate and reassess the Agreement.

Without this cooperative Federal and state government and private effort, it is unlikely that the Cooperators' enrolled properties would be used in the foreseeable future to enhance and/or restore SPB populations (or its habitat) in accordance with goals of this Agreement (and by inference – implement components of the Recovery Plan and the associated Strategy). Therefore, the cumulative effect of this Agreement and the activities it covers, which are facilitated by the assurances of the Permit and any associated Certificate of Inclusions<sup>6</sup>, is expected to provide a net conservation benefit to SPB.

The FWS finds that the Parties have developed the Agreement to compile with the tenants of the FWS' Safe Harbor policy.

**3. The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species.**

The ESA's legislative history establishes the intent of Congress that this issuance criteria be identical to a regulatory finding of no jeopardy under section 7(a)(2) (see 50 CFR 402.03). As a result, issuance of this section 10(a)(1)(A) Permit was reviewed by the FWS under section 7 of the ESA. In the biological opinion, which is attached hereto and incorporated herein by reference, the FWS concluded that approval of the Agreement and issuance of the Permit are not likely to jeopardize the continued existence of the SPB.

**4. Implementation of the terms of the Safe Harbor component of the Agreement is consistent with applicable Federal, state, and tribal laws and regulations.**

The FWS is unaware of any law or regulation that would prevent the implementation of the SHA elements of the Agreement and accompanying Permit. The Permit will include conditions that revoke the take provisions if any applicable state, Federal, or tribal law or regulation is broken.

The FWS finds that the Agreement has adequate provisions to ensure that the actions covered in the Agreement and step-down POMAs are consistent with applicable Federal, state, local, and tribal laws and regulations.

**5. Implementation of the terms of the Safe Harbor component of the Agreement will not be in conflict with any ongoing conservation or recovery programs for listed species covered by the permit.**

The FWS finds that the Agreement will implement the conservation goals and objectives of both the SPB Recovery Plan and the Strategy document mentioned earlier. Additionally, FWS finds that the other Parties have ensured, and will continue to ensure, that the implementation of the Safe Harbor component of the Agreement will not conflict with any other ongoing conservation or recovery programs for the covered species.

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<sup>6</sup> Certificates of Inclusion are described and discussed in Part 6 of this Agreement.

**6. The Parties have shown capability for and commitment to implementing all of the terms of the Safe Harbor component of the Agreement.**

Both the Agreement and the FWS' biological opinion identify actions currently being undertaken by the Parties to implement the conservation purposes and goals of the Agreement and to recover the SPB. FWS expects that the partnership created by the Agreement will both continue and expand conservation efforts within the targeted watershed.

Based on conservation measures described in the SHA element of the Agreement, and provisions of the Permit, the FWS does not expect any unforeseen circumstances to occur that would preclude the Parties' continued financial and technical assistance in implementation of the Agreement.

**B. CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES**

The species that would be affected by the Candidate Conservation Agreement with Assurances component of the Agreement and Permit is the federally-designated candidate species YCD.

**ISSUANCE CRITERIA - ANALYSIS AND FINDINGS**

The FWS finds that the Parties have met all of the application requirements for the Permit. In addition, the FWS finds that the Parties have met all issuance criteria for the Permit contained in 50 CFR 17.22(d)(2). These criteria are detailed below.

**1. The take will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Candidate Conservation Agreement with Assurances component of the Agreement.**

The FWS finds that the proposed take of the YCD would be incidental to otherwise lawful activities. These activities would occur as a result of the implementation of the conservation actions described in the CCAA element of the Agreement. The incidental take authorization of the Permit would not be triggered unless and until the YCD become federally-listed under the ESA.

**2. The Candidate Conservation Agreement component of the Agreement complies with the requirements of the Candidate Conservation Agreement with Assurances policy.**

Pursuant to the FWS' CCAA Policy, the FWS was required to determine whether this component of the Agreement satisfies the CCAA standard, i.e., that the benefits of the conservation measures implemented under the CCAA, when combined with those benefits that would be achieved if it were assumed that conservation measures were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species. As part of determining whether the proposed Agreement satisfies the CCAA standard, the FWS was required to determine that the conservation measures within the Agreement would be sufficient

to remove and/or significantly reduce the threats to the covered species.

The FWS believes that the conservation measures set forth in the CCAA elements of the Agreement meet the CCAA standard because the conservation measures, when combined with those benefits that would be achieved were it assumed that the measures would be implemented on other necessary properties, would materially and substantially reduce and/or eliminate all of the known threats to the covered species. In particular, implementation of the conservation measures is expected (in generic terms) to result in the following benefits to the covered species: (1) the protection, creation, restoration, and/or enhancement of suitable habitat for the covered species, (2) the maintenance of existing populations of the covered species and (3) removing the fear of the presence (or potential presence) of YCD through the use of the CCAA regulatory assurances. Each of these benefits can be expected to preclude or remove the need to list the covered species due to the elimination or reduction of the primary threats to the covered species and the maintenance of their populations and habitats, as defined in the Strategy and the Agreement.

The FWS finds that the Parties have developed the Agreement to compile with the tenants of the FWS' CCAA policy.

**3. The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any species.**

The ESA's legislative history establishes the intent of Congress that this issuance criteria be identical to a regulatory finding of no jeopardy under section 7(a)(2) (see 50 CFR 402.03). As a result, issuance of this section 10(a)(1)(A) Permit was reviewed by the FWS under section 7 of the ESA. In the FWS' Conference Opinion, the FWS concluded that issuance of the Permit will not jeopardize the continued existence of the covered species or any federally listed species. The taking associated with the implementation of the CCAA will be incidental to efforts associated with conservation efforts to restore and protect the covered species and efforts to gather important biological information necessary to continue conservation efforts for the species.

**4. Implementation of the terms of the Candidate Conservation Agreement component of the Agreement is consistent with applicable Federal, state, and tribal laws and regulations.**

The FWS is unaware of any law or regulation that would prevent the implementation of the CCAA elements of the Agreement and accompanying Permit. The Permit will include conditions that revoke the take provisions if any applicable Federal, state, or tribal law or regulation is broken.

The FWS finds that the Agreement has adequate provisions to ensure that the actions covered in the Agreement and step-down POMAs are consistent with applicable Federal, state, local, and tribal laws and regulations.

**5. Implementation of the terms of the Candidate Conservation Agreement component of the Agreement will not be in conflict with any ongoing conservation programs for species covered by the permit.**

The FWS finds that the Agreement will implement the conservation goals and objectives of the Strategy document mentioned earlier. Further, FWS finds that the implementation of the CCAA element of the Agreement will address the threats and other limiting factors acting on the species as outlined in the Strategy.

Additionally, FWS finds that the other Parties have ensured, and will continue to ensure, that the implementation of the CCAA component of the Agreement will not conflict with any other ongoing conservation programs for the YCD.

**6. The Parties have shown capability for and commitment to implementing all of the terms of the Candidate Conservation Agreement.**

Both the Agreement and the FWS' biological opinion identify actions currently being undertaken by the Parties to implement the conservation purposes and goals of the Agreement for the YCD. FWS expects that the partnership created by the Agreement will both continue and expand conservation efforts within the targeted watershed.

Based on conservation measures described in the CCAA element of the Agreement, and provisions of the Permit, the FWS does not expect any unforeseen circumstances to occur that would preclude the Parties' continued financial and technical assistance in implementation of the Agreement.

### **III. GENERAL CRITERIA AND DISQUALIFYING FACTORS**

#### **ISSUANCE CRITERIA - ANALYSIS AND FINDINGS**

The FWS has no evidence that the Permit application should be denied on the basis of criteria and conditions set forth in 50 CFR 13.21 (b-c).

### **IV. PUBLIC COMMENTS**

The FWS published a 30-day notice of availability of proposed Agreement in the September 8, 2006 Federal Register (71 Federal Register 53129). In response, the FWS received one comment letter from a conservation entity (Environmental Defense or ED). ED supported the provisions and intent of the Agreement and offered one clarifying recommendation with respect to the method(s) upon which the baseline determinations for the Safe Harbor component of the Agreement and the description of existing conditions of the Candidate Conservation Agreement Assurances component of the Agreement would be established and identified in each POMA. In response, the Parties have accepted the recommendations as stated by ED and have incorporated them into the final Agreement and associated documents.




## V. RECOMMENDATIONS

Based on our findings with respect to the Agreement and the FWS' analysis and decision documents (including this Set of Findings, the joint Biological Opinion and Conference Opinion, the National Environmental Policy Act determinations) and other aspects of the administrative record incorporated herein, the issuance of the Permit and execution of the Agreement as proposed by the Parties is recommended.

*Submittal:*

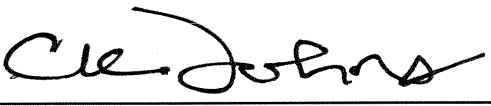


Assistant Regional Director

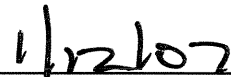


Date

*Concurrence:*



Deputy Regional Director



Date